

**BEFORE THE WORLD TRADE ORGANIZATION**

**UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING  
(COOL) REQUIREMENTS**

**(DS386)**



**MEXICO'S COMMENTS ON THE RESPONSES TO THE PANEL'S  
QUESTIONS FROM THE SECOND SUBSTANTIVE MEETING**

**Geneva  
14 January 2011**

## I. COMMENTS ON THE RESPONSES OF THE UNITED STATES

***Q89. (All parties) Please comment on the statements in paragraphs 3-6 of Brazil's third party oral statement at the second meeting concerning the relevance of Article 3.3 of the DSU and the specific WTO dispute reports referenced therein for determining whether the Panel should analyse the COOL requirements as a single measure.***

1. The United States asserts in paragraph 6 of its response as follows:

Similarly, the complaining parties fail to explain how the 2009 Final Rule operates in conjunction with the statute to give rise to a breach. Indeed, there are significant legal and substantive differences between the statute and regulations that have implications for how the WTO obligations at issue in this dispute apply. For example, the 2008 Interim Rule and 2009 Final Rule provide retailers with different rules regarding the use of the four categories of meat labels (A, B, C, D), indicating that the regulations, and not the COOL statute, prescribe in detail the labeling methods that must be followed. Further, the regulations themselves specify the label that must be applied to a product, unlike the CNENs at issue in the EC – IT Products case, which had to be read in conjunction with the CN in order to determine the relevant duty treatment. Here, the measures are distinct, and complainants have failed to offer evidence demonstrating that it is appropriate to analyze them as a “single measure.”

2. Mexico has previously explained its position that all legal instruments identified as measures under this proceeding are directly and legally related to each other. As Brazil pointed out, the fact that separate instruments or measures differ in their substance or legal status does not preclude that, operating together, they could breach specific provision of the WTO Agreements.<sup>1</sup>

3. The U.S. attempt to avoid scrutiny of the statute is not persuasive. Contrary to the U.S. assertion, it is the statute which provides for the creation of the regulations and the regulations are based on and implement the statute. Regulations can only implement statutes, and must do so in a manner consistent with the statutory language and intent. Regulations that are substantively different from, and/or inconsistent with, the statute that they are implementing can be struck down by U.S. courts as being contrary to law or ultra vires. The legal systems of most countries are structured similarly, with laws created by a Congress, Parliament or other law-making body and regulations issued by an executive authority to implement those laws. Therefore, it would be incorrect, to treat statutes and regulations as legal and substantively unrelated.

4. To treat implementing regulations as distinct from authorizing legislation would encourage governments to break up measures into separate legal instruments to evade review of the measures as a whole.

5. In this dispute, any effort to implement the statute through regulations will lead to a WTO- inconsistent measure because the statute is the starting point for the WTO- inconsistency.

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<sup>1</sup> See Mexico's Responses to Panel's Questions from the Second Substantive Meeting, paragraphs 1-4.

***Q90. (All parties) Please specify the percentage of the meat in the market respectively carrying labels A, B, C, D, and E under the COOL requirements since the introduction of the COOL requirements and up to November 2010.***

6. The United States affirms, in paragraph 7, that “USDA focused its resources on overall compliance and not on tracking the amount of meat products that carry each individual label at retail level”. But the United States goes on to state that “in July 2009, USDA conducted a limited survey of the labels being placed on covered commodities at 152 retail stores.” In this light, the United States submitted Exhibits 145 and 146 in support of its claim that a significant portion of beef made in the United States from Mexican and Canadian born cattle is being sold at retail stores, and also, that it is commingled with beef made from U.S. born cattle and marked with the B label.

7. The United States acknowledges that “it is unable to provide any statistically reliable information of this type”, that the survey results in Exhibit 145 were based on a “limited survey” of 152 retail stores and that it is “not a statistically reliable nationwide survey.” It is not possible to tell from the single page summary comprising the U.S. exhibit what methodology was used. For example, did the surveyors look at all of the beef in the freezers? Were the percentage amounts (or numbers) gathered from packages that were apparently available to shoppers at any given moment? Was the counting done on the basis of weight or number of packages? What were the numbers of packages counted? Were carcasses (or quarters) of unpackaged beef counted? Were the packages filled by the stores themselves or by the packers? Did the survey distinguish between these two types of packaging? Moreover, the United States does not indicate how many different grocery chains were visited. For example, if all 19 “warehouse club” stores included in the survey were from the same corporate chain, that would significantly skew the results.

8. In paragraph 11, the United States states that virtually all non-U.S.-produced beef is sold in restaurants, as processed food, or as ground beef, and asserts on that “[t]his further illustrates the U.S. point that it would not have made sense from a cost/benefit standpoint to require multiple countries to be listed on Category D beef given the limited amount of product covered by this scenario.”

9. The U.S. explanation for not applying the COOL Measure to Category D beef is a *post hoc* justification that is totally unsupported by the legislative and regulatory history of the COOL Measure. It is obvious that muscle cuts of beef marked with a foreign country's name are more difficult to sell in U.S. retail outlets -- which the United States has affirmed with its explanation that non-U.S. made beef is directed to uses not covered by the COOL Measure. Because Category D beef was already required to be marked with a non-U.S. origin label under pre-existing U.S. law, there was no need for the COOL Measure to impose additional requirements to fulfil its protectionist intent.

***91. (All parties) Please specify, if necessary using estimates, what proportion of the meat that could qualify for label A according to the COOL requirements is actually being labelled under the commingling provisions as labels B or C in the market.***

10. The United States claims, based on the limited data provided in Exhibits US-145 and US-146, that: (i) “the commingling provisions are being utilized by a significant number of companies”<sup>2</sup>; and (ii) “despite the significant amount of commingling that is occurring, it appears that the vast majority of Category A meat is receiving a Category A label”<sup>3</sup>. The U.S. claims are flawed and contradict each other. The limited data provided by the United States does not support the proposition that U.S. beef producers are “commingling”. On the other hand, the evidence provided by Mexico demonstrates that the use of the commingling rules has been discouraged by the United States.<sup>4</sup>

***Q92. (All parties) Please specify, or provide estimates of, what percentage of the meat consumed in the United States is sold at the retail stores covered by the COOL requirements and what percentage is sold through other channels (restaurants and other establishments, etc) excluded from the scope of the COOL requirements.***

11. The U.S. response includes the following statement in paragraph 15:

During its development of the 2009 Final Rule, USDA estimated that “47.0 percent of U.S. food sales occur through retailers subject to this rule, with the remaining 53.0 percent sold by retailers not subject to the rule or sold as food away from home.” The percentage of beef and pork sold through establishments subject to the COOL requirements is likely similar. For example, approximately 65 percent of beef is purchased for at home use in retail stores, and of this beef, approximately 85 percent is either muscle cuts or ground beef not subject to the processed foods exemption. This suggests that slightly more than half of the beef consumed in the United States is covered by the 2009 Final Rule’s requirements.

12. The U.S. response confirms the gaps in the coverage of the COOL Measure, which include exemptions for food service establishments and processed beef.

***Q99. (All parties) In connection with Panel question No. 91 above, please explain with appropriate evidence whether, and if so how, the Vilsack letter resulted in any change in the relevant figures.***

13. The U.S. response includes the following assertion in paragraph 25:

In fact, the two exhibits that the complaining parties cite to in an attempt to show that U.S. industry has modified its practice in response to the Vilsack Letter do not show this at all. The first exhibit, Exhibit MEX-33, pre-dates the issuance of the Vilsack Letter by six months. The second exhibit, Exhibit MEX-67, demonstrates that industry views the Vilsack Letter as voluntary.

The United States mischaracterizes Mexico’s use of the evidence.

14. In paragraph 23 of Mexico’s Responses to the Panel’s Questions from the First Substantive Meeting, Mexico explained the significance of Exhibit MEX-33 as follows:

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<sup>2</sup> U.S. Answers to Panel’s Second Set of Questions, paragraph 13.

<sup>3</sup> *Id.*, paragraph 14.

<sup>4</sup> See MEX-33, BCI MEX-42, MEX-55, MEX-67.

When viewed independently of the COOL measure, it is important to note that the Vilsack letter was not an isolated act of the government, but a letter that reflected the pressure that USDA already had been putting on the market participants to comply with the COOL measure in a certain manner and to which the industry had already been responding. In particular, the evidence presented by Mexico in Exhibit MEX-33 shows that, even before the Vilsack letter was issued, USDA was pressuring the industry not to use the commingling rules and the industry was complying.

15. In paragraph 25 of Mexico's Responses to the Panel's Questions from the First Substantive Meeting, Mexico noted that the American Meat Institute (the trade association of the U.S. meat packing industry) issued a press release (Exhibit MEX-67) the same day as the Vilsack letter was issued, announcing that 95% of beef and pork products eligible to bear a "Product of the USA" label would bear such a label. Obviously the American Meat Institute knew in advance that the Vilsack letter was being issued, and because the packing industry had already been subject to non-public pressure from USDA – as indicated by Exhibit MEX-33 – it was prepared to announce immediately that its members would avoid commingling U.S. born cattle with Mexican and Canadian cattle to the greatest extent possible.

16. The U.S. response reflects its approach of trying to focus attention on each individual aspect of implementation of the COOL Measure in isolation, without regard to the overall factual circumstances. The U.S. approach would establish a blueprint for evasion of WTO obligations by breaking apart measures into separate components and keeping some aspects of implementation private, and then demanding that panels evaluate each aspect of the measure separately rather than viewing it as a whole.

17. In this case, as Mexico has pointed out on numerous occasions, even without the Vilsack letter, the COOL provisions in the 2002 Farm Bill and 2009 Final Rule are discriminatory, and create an unnecessary obstacle to trade. Whatever weight is ultimately given to the Vilsack letter, it will not change this fundamental fact.

***Q100. (All parties) In paragraph 7 of its third party oral statement at the second meeting, Brazil stated that "a document which may not in itself constitute a technical regulation could nevertheless be relevant to an examination under Article 2.2, insofar as it is relevant to the application of the technical regulation itself." Please comment.***

18. The U.S. response includes the following statement in paragraph 26:

"... [t]he Vilsack Letter does not represent the "administration" or "application" of the 2009 Final Rule or any other of the COOL instruments. It does not "put into practical effect" or "apply" the 2009 Final Rule. To the contrary, the Vilsack Letter makes voluntary suggestions that industry may choose to follow outside the requirements of the 2009 Final Rule itself."

19. It is unreasonable for the United States to argue that a threatening letter issued by the Head of the USDA, "suggesting" to the industry how to comply with the COOL Measure, does not represent the administration or application of the Measure. The letter is clear evidence that confirms USDA's strict interpretation and application of the requirements of the COOL Measure.

***Q110. (United States) The United States argued in paragraph 25 of its oral statement at the second meeting that "USDA has verified that at least one major livestock producer is commingling". Please specify the market share of such processor in the US beef market and, if possible, examples of other processors and the market shares of all processors.***

20. The U.S. response includes the following assertion in paragraph 59:

The United States has submitted exhibits demonstrating that two of the four largest beef producers in the United States are commingling. In addition, Canada submitted an exhibit demonstrating that the other two largest beef producers are accepting both U.S. origin and foreign origin livestock. Given that these companies are accepting both forms of livestock, and other evidence submitted by the United States indicates that up to 22 percent of the beef being sold at the retail level is commingled, it is likely that all four of the top beef producers in the United States are commingling in at least some of their plants. Exhibit US-152 contains more detailed information on this issue.

21. The evidence cited by the United States does *not* support the proposition that certain of the largest U.S. beef producers are “commingling”. To the contrary, the evidence supports Mexico’s position that the top four U.S. domestic beef producers are segregating production of beef derived from US born and Mexican born cattle.

22. The top four beef producers in the United States as measured by market share of domestic beef market (2009 data) are: Tyson (22%); Cargill (22%); JBS USA (21%); and National Beef (10%).<sup>5</sup>

23. The United States cites Exhibits US-101 (BCI) and US-102 (BCI) for the propositions that “two of the four largest beef producers in the United States are commingling”.

24. Exhibit US-101 includes affidavits from cattle suppliers to one of the top four beef producers. However, these affidavits show only that the beef producer received shipments of Mexican cattle. They do not prove that the beef producer is commingling beef derived from US born and Mexican born cattle or commingling the slaughter of US born and Mexican born cattle. As shown by Mexico, the top beef producers including the producer referenced in Exhibit US-101 are reducing their plants accepting Mexican cattle and are reducing the number of days per week that Mexican cattle are processed.<sup>6</sup> In this way, the producers are segregating their production. If they were commingling production there would be no need to reduce the plants accepting Mexican cattle and the days Mexican cattle are processed. The United States fails to recognize that streaming production of beef from Mexican born cattle to certain plants and to certain days is itself a form of production segregation.

25. Exhibit US-102 refers in paragraph 2 to a top four U.S. beef producer that slaughters cattle from Mexico at one of its processing plants. This does not prove that the beef producer is commingling beef derived from US born and Mexican born cattle or commingling the slaughter of US born and Mexican born cattle. By limiting the plants accepting Mexican cattle

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<sup>5</sup> Exhibit MEX-111, p. 5.

<sup>6</sup> Mexico’s Responses to Questions 121 and 122 of the Panel.

this producer is segregating. If it was commingling there would be no need to reduce the plants accepting Mexican cattle.

26. The United States cites Exhibit CAN-41 for the following proposition:

the other two largest beef producers are accepting both U.S. origin and foreign origin livestock. Given that these companies are accepting both forms of livestock, and other evidence submitted by the United States indicates that up to 22 percent of the beef being sold at the retail level is commingled, it is likely that all four of the top beef producers in the United States are commingling in at least some of their plants.

27. Exhibit CAN-41 simply demonstrates that Cargill, Tyson and JBS are accepting Mexican and Canadian cattle at certain plants and on certain days which, as explained above, is segregation. It does not demonstrate that these producers are commingling beef derived from US born and Mexican born cattle or commingling the slaughter of US born and Mexican born cattle.

28. The United States also cites Exhibits US-145 and US-152 as further support for its proposition that the top U.S. beef producers are commingling the production of beef derived from US born and Mexican born cattle. These exhibits do not support the proposition. Exhibit US-145 is a retail survey and therefore is not necessarily indicative of what is occurring at slaughterhouses. To the extent it shows that multiple origin labels are being used, it does not indicate that there was commingling in the slaughterhouse. Exhibit US-152 simply demonstrates that U.S. processors are sourcing non-US cattle. It is not indicative of whether or not there is commingling at the slaughterhouse. As explained by Mexico, Mexican cattle are being segregated by restricting processing plants and processing days. This key factor is not addressed in either of these two exhibits.

***Q113. (All parties) Please explain whether the proper assessment of the impact of a Government regulation on the market requires a certain period of implementation time. If yes, please explain the length of this period in regard to the COOL requirements.***

29. The United States states that “it is important to recall that there will be a period of adjustment after the adoption of any new technical regulation”. However, the United States misses the point that although it is true that any new regulation will take time to implement, the COOL Measure continues to have a negative effect upon imported Mexican cattle and will do so into the foreseeable future.<sup>7</sup>

30. In paragraph 64 of its response, the United States makes the following statement:

nearly all of the evidence that Canada and Mexico have put forward relates to the period between the issuance of the 2008 Interim Rule in August 2008 and the months immediately after the 2009 Final Rule was adopted in March 2009.<sup>8</sup>

31. This statement is simply incorrect. Footnote 78 of the U.S. Answers to Panel's Second Set of Questions makes no reference to Mexico's evidence.

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<sup>7</sup> Mexico's Responses to the Panel's Questions from the Second Substantive Meeting, paragraph 68.

<sup>8</sup> U.S. Answers to Panel's Second Set of Questions, paragraph 59.

32. Mexico has presented updated and current evidence in support of its case. See the following exhibits:

Exhibit Number	Content	Relevant Date
Exhibit MEX-37	Affidavit of the President of the Confederación Nacional de Organizaciones Ganaderas (CNOG)	17 May 2010
Exhibit MEX-97	Affidavit of the President of the Confederación Nacional de Organizaciones Ganaderas (CNOG)	25 October 2010
Exhibit MEX-105	Affidavit of the President of the Confederación Nacional de Organizaciones Ganaderas (CNOG)	22 December 2010
Exhibit MEX-106	Affidavit of the President of the Union Ganadera Regional de Chihuahua	28 December 2010

***Q118. (United States) The United States refers to several options other than segregation for domestic meat producers to be able to meet the COOL requirements. Is it also the case for meat producers who wish to use both imported and domestic livestock and at the same time want to sell meat derived from US born, raised and slaughtered livestock with the "Product of U.S.A" label (label A)?***

33. Paragraph 66 of the U.S. response makes the following assertion:

As the United States indicated in previous submissions, meat producers may process both imported and domestic livestock and sell Category A meat without segregating their production lines. One option for meat producers to do this is to accept different types of meat on different production days and label the meat accordingly. Alternatively, meat producers can commingle both imported and domestic livestock during the first production run of the day and label the resulting product Category B and then process the remaining domestic livestock as Category A meat in the second production run of the day. Neither option would result in less favourable treatment for imported livestock *vis-à-vis* domestic livestock.

34. This question asks for information on options “other than segregation”. As discussed in Mexico’s comment on the U.S. response to Question 110, above, restricting the processing of Mexican cattle to certain production days or certain times during the day is a form of segregation. The options presented by the United States involve segregation of beef derived



from U.S. born and Mexican born cattle. If production was commingled (i.e., not segregated) there would be no reason to restrict the processing of Mexican cattle to specific days or times.

***Q120. The United States argues that any segregation cost additionally caused by the COOL requirements is minimal because the industry had already been segregating livestock prior to the COOL requirements.***

***(a) (United States) What is the extent or magnitude of the additional costs of the COOL requirements? For example, does the United States agree to the figures provided by Canada? If not, please provide relevant figures or at least a reasoned estimate.***

35. Paragraph 67 of the U.S. response states as follows:

...More fundamentally, if segregation costs were as high as Canada asserts they are – up to \$35 to \$40 per head of cattle – the export of Canadian cattle to the United States would drop precipitously as would the price paid for these animals. To the contrary, the economic data presented by the United States directly contradicts this fact and shows that both Canadian livestock exports and prices are rising in 2010, and prices are at levels consistent with U.S. prices.

36. The COOL price discount applied to Mexican cattle is consistent with and supports Canada's assertion that the segregation costs are up to \$35-\$40 per head of cattle. See paragraphs 81-82 of Mexico's Responses to the Panel's Questions which observe, *inter alia*, that on 6 December 2010 a large U.S. slaughterhouse was still demanding a \$40 price discount for fed cattle that were born in Mexico (see also Exhibits MEX-33, MEX-37, MEX-42, MEX-46, MEX-48, MEX-64, BCI MEX-97, BCI MEX-105 and BCI MEX-106).

***(c) (All parties) Apart from the costs, please explain whether, and if so how, segregation required in the meat production process differs depending on its purpose, such as meat quality, safety control, export specifications and country of origin. Particularly, is it more difficult for the industry to segregate livestock based on country of origin than based on other factors such as meat quality and safety.***

37. The U.S. response includes the following assertion in paragraph 69:

To the extent that meat producers segregate – whether to meet export requirements, for grade labeling, or in response to the 2009 Final Rule – Canada and Mexico have failed to establish that doing so in response to the COOL measures would be more difficult or costly than for any other purpose. For example, if a feed lot or slaughterhouse contains animals whose meat will be exported, the age and origin of certain animals may need to be tracked for export verification purposes. Such tracking would be quite similar to that which could be used to track origin for purposes of responding to the 2009 Final Rule if a company decided to do so. Similarly, after a carcass is graded at the slaughterhouse, a records or labeling system would need to be in place to ensure the integrity of the grade claims at retail. The same would be applicable to meat of a particular origin for purposes of meeting the 2009 Final Rule.

38. The need for segregation caused by the COOL measures undoubtedly leads to the less favourable treatment to Mexican exports in the United States. It is not a question of whether COOL segregation is more "difficult or costly" than segregation for other purposes. Prior to COOL, Mexican-born cattle were not discriminated against because of their nativity. COOL explicitly imposes costs on Mexican cattle depending upon their country of birth which are not borne by U.S. cattle.

***Q124. (United States) Canada argues in its second written submission (paragraph 9) that the OECD Checklist for Regulatory Decision Making (US-66) does not support the assertion that the COOL measure is consistent with its national treatment obligation. Canada further claims that the OECD Checklist only provides guidelines for OECD members to consider when developing regulations. The Panel notes that the Checklist asks the questions whether the benefits of regulation justify the costs (Point 6) and whether the distribution of effects across society are transparent (Point 7). In light of this and assuming that any regulation creates costs and these costs may not always be equally spread as pointed out by the United States in its response to Panel question No. 14, please explain how the costs of the US government intervention in the case of the COOL requirements were assessed across social groups and specifically what consideration was given to costs faced by Canadian and Mexican exporters of hogs and livestock.***

39. The United States asserts in paragraph 76 that "in designing the 2009 Final Rule, USDA took concrete steps to attempt to reduce the effect of the measure on both U.S. market actors and on Canadian and Mexican livestock."

40. However, even with the purported "flexibilities" that the United States claims to exist in the Final Rule, as explained by Mexico in its First Written Submission<sup>9</sup>, the United States was fully aware that processors handling only products made from U.S. born cattle origin would have lower implementations costs compared with processors handling both non-U.S. and U.S. cattle.

***Q129. (United States) The legislative process relating to the COOL requirements allegedly started in 2002. Can the United States refer to a policy, social norm or consumer demand prior to that date that had called for the information on the origin of meat products as defined by the United States?***

41. The United States, in paragraph 79, cites to the U.S. customs law requirements for origin labeling and proposed legislation for mandatory meat labeling dating from the 1960s. In paragraph 80, it lists some comments filed in response to a request for public comments by the FSIS in 2001.

42. Mexico and Canada have explained that the legislative process relating to the COOL Measure started in the late 1990s, with legislation proposed by advocates for the U.S. cattle industry that would require identification of the country of birth of cattle from which beef was produced. The legislators who supported that legislation were frank in stating that their intent

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<sup>9</sup> Mexico's First Written Submission, paragraphs 187, 188.

was to favour the U.S. domestic industry. The substance of those proposals, with minor modifications, was later incorporated into the 2002 Farm Bill.<sup>10</sup>

43. With regard to the earlier legislative proposals referenced by the United States from the 1960s, Mexico previously noted that:

... none of the legislative proposals submitted by the United States included the born/raised/slaughtered origin rule for meat products. Rather, those proposals involved general requirements for origin labeling, which are unrelated to Mexico's claims in this proceeding.<sup>11</sup>

44. During the second session, the United States committed to search for more complete evidence, but noted that the records were not available in electronic form and therefore were difficult to research. Ultimately, in its response to the Panel's question the United States did not provide any new evidence, but rather simply cited to several public comments it previously submitted. Without access to the complete record of public comments, it is not possible to judge whether the comments selected by the United States are representative of "public opinion" on the subject. Moreover, because the FSIS procedure post-dated the legislative proposals – which were still pending at that time – there is an implication that not all the comments cited by the United States may have represented independent ideas.

45. Moreover, the United States is putting forward as evidence comments regarding a rule making process on the meaning on "Product of the USA". This limited evidence does not relate to consumer demand for information and does not serve to prove any consumer demand calling for the creation of the COOL Measure

***Q132. (United States) Is the objective of providing "consumer information" on country of origin always legitimate within the meaning of Article 2.2? If yes, please explain the legal basis for such a position. If not, assuming that consumers generally appreciate more information on products they purchase at the retail level, what should be the criteria for determining whether or not the objective of mandating consumer information on country of origin in a given set of circumstances is "legitimate" within the meaning of Article 2.2?***

46. Included in paragraphs 84 and 85 of the United States' response to this question are the following statements:

"As an initial matter, while a panel under Article 2.2 should review whether the stated objective of a measure is in fact the measure's objective and not for example protectionism, it is not the role of the WTO or a panel to decide which policy objectives a Member may otherwise pursue. [...]"

"With respect to whether consumer information is always a legitimate objective, providing consumers with country of origin information about the food products they buy in order to help them make informed purchasing decisions is always a legitimate objective within the meaning of TBT Article 2.2."

<sup>10</sup> Mexico's First Written Submission, paragraphs 177-86; Canada's First Written Submission, paragraph 14.

<sup>11</sup> Mexico's Second Written Submission, paragraph 193.

47. This response underscores the importance of the Panel first determining all relevant details of the objective of the technical regulation before assessing whether that objective is legitimate.<sup>12</sup> It is Mexico's position that the objective of the U.S. measure is purely protectionist. If the panel accepted the stated objective by the U.S., this objective is not just that one stated by the United States in this answer, i.e., "providing consumers with country of origin information". Rather, the objective is providing a specific type of country of origin information, namely where the cattle which were processed into beef were born, raised and slaughtered.

48. It is when the objective of the U.S. measure is analyzed to this level of specificity that its protectionist objective becomes apparent. It is Mexico's position that the manner in which the COOL Measure requires information on country of origin information cannot be a legitimate objective because the labelling requirement has only one purpose which is inherently protectionist. That purpose is to distinguish between beef produced from U.S. born cattle and beef produced from foreign born cattle so that U.S. consumers can exercise a preference for beef made from domestic cattle just because the cattle are domestic. In other words, it is to discriminate against foreign born cattle to the benefit of domestic born cattle.

49. Mexico acknowledges that in some circumstances information on the foreign origin of a product may favour the foreign product. However, on the facts of this dispute there is no evidence that the U.S. measure favours or is intended to favour Mexican cattle over like U.S. cattle.

***Q133. (United States) To the extent that a USDA grade label is issued based on meat quality and safety control regardless of the origin of meat, what is the value consumers receive from the country of origin information on meat products? Are consumer organizations and consumers aware of the costs of additional information; what is their readiness to pay for such information? How do consumers benefit from knowing the country of origin of meat under the COOL requirements?***

50. The U.S. response includes the following statement in paragraph 90:

Consumers benefit from country of origin labeling because it helps them make informed purchasing decisions about the food products that they buy at the retail level. Consumers may find this additional information about origin valuable for a variety of reasons, such as the fact that it may allow them to purchase food from countries that they associate with a reputation for high quality or safety, among other considerations.

51. Mexico observes that the United States has consistently affirmed that the COOL Measure is not a safety measure, including in its notification of the measure to the TBT Committee. Accordingly, it is contradictory and inappropriate for the United States now to assert that the COOL label conveys information related to safety.

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<sup>12</sup> This is discussed in Mexico's response to Questions 54 and 55 of the Panel. See paragraphs 147-149 and 150-154 of Mexico's Responses to the Panel's Questions from the First Substantive Meeting.

52. The USDA grade label is indeed issued based on quality and USDA inspection of all beef products for safety is mandatory. Based on the U.S. response to Question 133, it appears that the true goal of the COOL Measure is to confuse consumers by presenting information that consumers could interpret as contradicting the quality and safety assurances provided by USDA. That certainly cannot be deemed a legitimate objective.

53. In fact, the COOL Measure has nothing to do with quality, safety, environmental and ethical principles, etc.

54. The United States also asserts, in paragraph 91, that “consumers are aware of the costs of providing this additional information and that they may be willing to pay more for this information.” This assertion contradicts the USDA’s express recognition in the Final Rule, that consumers were not willing to pay the costs for this information.<sup>13</sup>

***Q134. (United States) Can the United States point to any evidence demonstrating that the United States has always defined the country of origin concerning meat products for purposes other than customs as the place where the animal from which meat was derived was born, raised, and slaughtered? In this regard, is there any evidence showing that this has also always been the US consumers' understanding of the country of origin of meat products?***

55. The United States asserts in paragraph 93:

Consumers who wrote to FSIS concerning this rule almost unanimously suggested that USDA should require the source animal to be born, raised, and slaughtered in the United States in order for the resulting meat product to be labeled “U.S. origin.” This indicates that consumers typically understand the origin of meat as including where that animal was born and raised, and not just where the animal was slaughtered.

56. The United States has not presented sufficient evidence to prove that most of the consumers in the United States define the country of origin concerning meat products as the place where the animal from which the meat was derived was born, raised and slaughter. Without access to the complete record of public comments, it is not possible to judge whether the comments selected by the United States are representative of “public opinion” on the subject.

***Q.139 (United States) Is it the United States' view that US consumers are misled or confused as to the origin of meat they buy at the retail level if the meat had the country of origin label based on substantial transformation? If so, does that view apply only to meats produced from Canadian and Mexican livestock?***

57. Paragraphs 95 and 96 of the U.S. response to this questions contains the following statements:

“The United States does not believe that consumers would be misled or confused in all cases if the U.S. country of origin labeling requirements were based on substantial transformation...”

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<sup>13</sup> Mexico's First Written SubmissionS, paragraph 89.

"This confusion arises almost exclusively with regard to meat produced in the United States from Canadian and Mexican livestock. ..."

58. These statements are contradictory, since the slaughter and processing of Mexican livestock in the United States easily satisfies the substantial transformation test. Moreover, the United States relies upon the substantial transformation test to determine the country of origin labeling requirements for virtually all other products made in the United States – including for other types of food products and even animal parts (other than muscle cuts and ground beef) that are derived from the same cattle at issue here. As Mexico has mentioned several times, the COOL measure does not alleviate any confusion with respect to meat produces from cattle born in Mexico, raised and slaughter in the United States. Rather it creates more confusion.<sup>14</sup>

***Q146. (All parties) Please explain whether there is any discrepancy between a traceback system and traceability. If so, please define the concept "traceability".***

59. Paragraph 103 of the United States' response to this question states:

Canada and Mexico have failed to establish that a traceability system would be significantly less restrictive than the record keeping system under the 2009 Final Rule. Just the contrary is true. As was discussed at the Second Panel Hearing, a traceability system is significantly costly to implement and would increase overall compliance costs. Indeed, for Canada and Mexico increasing costs is the purpose of adopting a traceability system. Yet they have complained that the costs of complying with the 2009 Final Rule is what makes it trade restrictive. They cannot have it both ways. Furthermore, it appears that they propose to add traceability as an additional layer of requirements in addition to, rather than in place of, the COOL measures. It is difficult to understand how adding additional requirements not necessary to fulfill the U.S. legitimate objective can be a less trade restrictive alternative within the meaning of Article 2.2 of the TBT Agreement.

60. Mexico acknowledges that there would be costs associated with the establishment of a fairly implemented trace back system. However, this does not mean that such a system is not less trade restrictive.

61. As explained in Mexico's response to Question 145 of the Panel, it is less trade restrictive because:

A trace back system would impose the same requirements on both domestic and imported animals and therefore would not give rise to the discriminatory lowest cost compliance solution referred to in the first option (i.e., there would be no incentive to exclude non-U.S. animals). In Mexico's view, if there were trace back to the originating farm, there would likely be no incentive to exclude imported Mexican cattle or shift the cost of compliance solely to Mexican animals. This is because all farmers would be treated the same and it would be immaterial where they were located. Because U.S. beef processors would still have to trace U.S. cattle to individual farms, there would be no cost saving associated with excluding Mexican

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See e.g. Mexico's Second Written Submission, paragraphs 46, 48 and 91.

cattle. Thus, the economic incentive to discriminate against Mexican cattle would likely be eliminated.

A trace back system under which the U.S. producers incur similar costs would place domestic and foreign producers on equal ground and ultimately be less restrictive on international trade than the current COOL requirements. Thus, a fairly implemented trace back system would eliminate the modification of conditions of competition that Mexico is complaining about.

62. The obligation in the first sentence of Article 2.2 is to avoid obstacles to “international trade” (e.g., imports of cattle from Mexico). By eliminating the modification of conditions of competition against Mexican cattle, a trace back system will clearly be less trade restrictive. This point is further explained in Canada’s response to Question 145 of the Panel.

***Q151. (United States) The United States argues that the interpretive approach undertaken in connection with the term "necessary" under Article XX of the GATT 1994 should not be applied to the analysis under Article 2.2 of the TBT Agreement because, inter alia, there is no textual basis for such an application (United States' second written submission, paragraphs 104-105). Please elaborate on this argument by addressing in particular the similarities between these two provisions, including the term "necessary to" and the types of objectives listed in both provisions (e.g. to protect human health or safety, animal or plant life or health, or the environment, to prevent deceptive practices).***

63. Paragraph 108 of the U.S. response states:

By contrast, under TBT Article 2.2, the question is whether a measure a Member has adopted to achieve a legitimate objective (a measure which may or may not be WTO-consistent), restricts trade more than required to fulfill that legitimate objective.

64. Mexico questions where a WTO-inconsistent measure could be used to demonstrate that a technical regulation is more trade restrictive than necessary to fulfil a legitimate objective within the meaning of Article 2.2. In this dispute it is not necessary for the Panel to consider this issue because the less trade restrictive alternative proposed by Mexico, i.e., a fairly implemented trace back system, would be WTO consistent.

***Q152. (Mexico and United States) What is the relevance, if any, for Mexico's S&D claims of the findings of the Panel in EC - Approval and Marketing of Biotech Products with regard to Article 10.1 of the SPS Agreement? WT/DS291-292-293/R, paras. 7.1605-7.1626.)***

65. Paragraphs 113-114 of the U.S. response state as follows:

The Panel in this dispute should adopt a similar interpretation of TBT Article 12.3 as the EC – Biotech panel adopted for SPS Article 10.1. Based on this interpretation, Mexico has clearly failed to establish that the United States has breached TBT Article 12.3 since Mexico has failed to even identify what its special needs are or to adduce evidence to show that it made the United States aware of these special needs.

Even aside from these considerations, the United States has put forward significant evidence to show that it considered Mexico's views throughout the process of developing the 2009 Final Rule.

66. In its response to Question 152, Mexico presents several reasons why the reasoning of the panel in *EC – Biotech* is not relevant to Mexico's claims under Article 12 of the TBT Agreement.

67. The above statement of the United States assumes that Mexico has an obligation to identify its special needs and to adduce evidence to show that it made the United States aware of these special needs. There is no such obligation in Article 12.3. To the contrary, Mexico is recognized as a developing country Member. Moreover, the United States acknowledges that "the only significant exporters of livestock to the United States are Canada and Mexico".<sup>15</sup> In such circumstances it is a given that Mexico has the "special development, financial and trade needs" referred to in Article 12.3 that must be taken into account by the United States in the preparation and application of the COOL Measure. The United States has failed to comply with this obligation, in particular with respect to the COOL statute which, as discussed above in Mexico's comment on the U.S. response to Question 89, is at the core of the COOL Measure.

## II. RESPONSES OF THE EUROPEAN UNION

**26. *Is there a relationship between the importance of an objective and the risks non-fulfilment of the objective would create under Article 2.2? If so, please explain the nature of such a relationship.***

68. Paragraph 6 of the EU response reads as follows:

In the view of the EU, what is referenced in Article 2.2 is not just *any* risk, but rather the particular risks that flow from non-fulfilment of the objective. As we have indicated above, we think that these may constitute something of a "mixed bag", together with other considerations, in this particular case. For example, one of the "risks" that might arise might be the risk arising from the fact that a consumer is not in a position to adapt purchase and consumption decisions to take into account a perceived SPS-type risk. One's reaction to that depends upon whether or not one thinks that it is fair and reasonable to ultimately allow people to make such decisions themselves if they wish to, as opposed to attempting to use the covered agreements to force governments to make such decisions on behalf of their populations and in turn impose them on their citizens. In the context of all the facts of this case, the EU inclines to the latter view. Another example is the "risk" that consumers would not be in a position to exercise a preference for a foreign product, for example for development reasons. It strikes the EU that that might be a matter of regret. A third example is that consumers would not be in a position to exercise a preference for a domestic product just because it is domestic. Taking the covered agreements as a whole, that does not appear to the EU to be a "risk" that would carry any weight at all.

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U.S. Answers to Panel's Second Set of Questions, paragraph 96.



69. It is Mexico's position that the COOL Measure is more trade restrictive than necessary "taking into account the risks non-fulfilment would create".<sup>16</sup> In Mexico's view, the importance of satisfying the objective of providing consumer information at issue here, is low. Likewise, the possibility of adverse consequences arising should the objective not be carried out is low and to the extent that those consequences arise they will be restricted to a limited sub-set of U.S. consumers.<sup>17</sup>

70. At the end of the above EU response it is stated that one risk is that "consumers would not be in a position to exercise a preference for a domestic product just because it is domestic" and that "does not appear to the EU to be a 'risk' that would carry any weight at all". Mexico agrees with this point. As noted above in Mexico's comment on the U.S. response to Question 132, the objective of the COOL Measure is to distinguish between beef produced from U.S. born cattle and beef produced by foreign born cattle so that U.S. consumers can exercise a preference for beef made from domestic cattle just because the cattle are domestic. If that objective is not fulfilled nothing is lost and something is gained because discrimination is avoided. The nature of this risk underscores the point made in Mexico's comment on the U.S. response to Question 132 that the objective of the COOL Measure is protectionist and is not legitimate. It is pure protectionism.

**32. *Please explain the legal basis for the suggestion in paragraph 18 of the third party statement of the European Union, including in regard to judicial economy.***

71. Paragraph 21 of the EU Response states as follows:

In this particular case, it seems to the EU that allowing the use of Label B as outlined above, and dealing with the Vilsack Letter (and possibly Article 12 of the *TBT Agreement*), would substantially meet the concerns of the complaining Members, and with that in mind we wonder whether or not it would really be necessary for the Panel to consider the other matters raised by the complaining Members at this stage in order to promptly resolve the dispute.

72. Mexico does not agree with the EU suggestion. Allowing the use of Label B as outlined above and dealing with the Vilsack Letter would not eliminate the modification of conditions of competition that underlies the violations of the non-discrimination obligations raised by Mexico. The least cost way to comply with the COOL Measure will still be to eliminate or segregate Mexican cattle from the production stream. With respect to the Vilsack Letter, that letter simply confirms USDA's strict interpretation and application of the statute and regulations so dealing with the letter without dealing with the statute and regulations would be meaningless.

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<sup>16</sup> Mexico's First Written Submission, paragraphs 311-318; Second Written Submission, paragraphs 165-169.

<sup>17</sup> Mexico's First Written Submission, paragraph 314; Second Written Submission, paragraph 168.